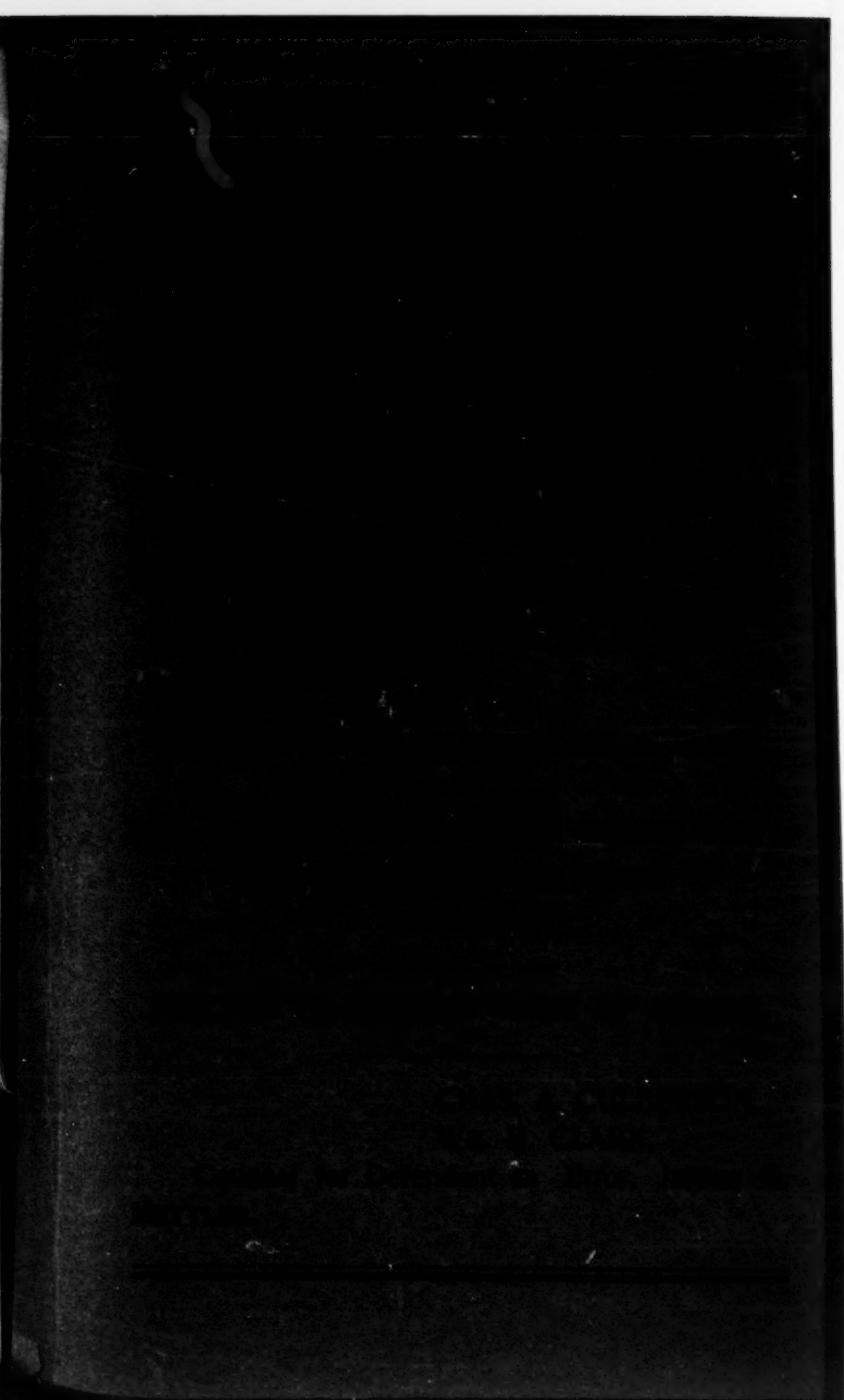

No. 428.

In the Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

—VS.—

JENNIE M. METTLER, DEFENDANT IN ERROR.

Error to the United States Circuit Court, Northern District of Texas, at Dallas.

MOTION TO DISMISS WRIT OF ERROR.

Comes now Jennie M. Mettler, the defendant in error, a *feme sole,* in the above entitled cause, by her counsel, appearing in that behalf, and moves the Court to dismiss this writ of error, for the following reasons, to-wit:

I.

This Honorable Court has not jurisdiction of the cause. The defendant in error, as plaintiff below, a resident and a citizen of the state of Texas, filed this suit on the 2nd day of December, 1897, in the District Court of Dallas County, 44th Judicial District of Texas, to recover judgment against the plaintiff in error, defendant below, a corporation created and operated under and by virtue of the laws of the State of Pennsylvania, upon three certain policies of insurance of $5,000.00 each, issued simultaneously by plaintiff in error on the 31st day of October, 1896, insuring the life of William A. Hunter, brother of the defendant in error, for her benefit, the policies being payable to her.

It is alleged by the defendant in error that her brother, William A. Hunter, was drowned on December 4th, 1896, in a quick-sand river—the Pecos —of Texas, and that his body was never found. (Record pp. 2, 9,). On the 4th day of January, 1898, the plaintiff in error filed in the State Court its petition and bond for removal of the cause to the United States Circuit Court, Northern District of Texas, the sole ground of the petition for removal being *diversity of citizenship*, and no other ground existing therefor. (Record pp. 4, 5, 6). No Federal question of law was presented by the petition.

The transcript of the record from the State Court was duly filed in the Circuit Court, and plaintiff in error filed its original answer in that Court, presenting no question that would give this Court jurisdiction, pleading: (1) general demurrer; (2) general denial; (3) specially, that the proofs of death did not show that the insured was dead; (4) breach of warranty, in that the insured stated in his application for insurance, that his occupation was "real estate and farming, prior was bookkeeping." That he was not and had not been for a long time prior thereto, if he ever was, engaged in farming, and that his occupation at the time and just preceding the making of said application was that of an assistant in a photograph gallery. (Record p. p.).

On November 11, 1899, the defendant in error filed her first amended original petition, pleading ~~said~~ Art. 3071, of the Rev. Stats. of Texas, 1895, providing for ~~said~~ 12 per cent. damages and reasonable attorney's fees in such cases as this, and suing therefor in addition to the principal and interest originally sued for. In this petition defendant in error also pleaded in waiver of the insufficiency of her proofs of death, if same were insufficient, as follows:

"5. That upon receiving from plaintiff, as afore-

said, notice of the death of the said William A. Hunter, it was the duty of the defendant, according to the terms of its policies, to furnish plaintiff blank forms for proof of death and claim, it being usual for life insurance companies to furnish same, and it being provided by said policies that plaintiff should make said proof of death and claim upon such blank forms, proper blank forms to be furnished by the said defendant, as aforesaid.

"Plaintiff shows that the defendant, upon receiving said notice of the death of her brother, sent its 'general, agent,' representative and adjuster, R. C. Milliken, to Pecos, Texas, with printed blank forms, for proof, to furnish plaintiff said forms and to receive the proof when executed; that the said R. C. Milliken, for the defendant, came to Pecos in response to said notice, saw plaintiff, who was a widow, without a male relative in Texas, and wholly ignorant as to how to make out said proof of death and claim, and represented to her that he would advise her of the necessary requirements of and information to be embraced in her said proof of death and claim, and aid her in making out the same. Plaintiff avers that, knowing her own ignorance in reference thereto, and having been induced to believe by the said R. C. Milliken that he would act in the best of good faith in the matter, plaintiff, at his re-

quest, gave him full information in reference to said William A. Hunter leaving Pecos and being drowned in Pecos River, and of where he had spent his life, and in what business he had engaged, and information where he could obtain his latest photograph, and gave him full data in reference to the names and address of his father, brothers, sisters, that is full information of the family, and where and in what business they had spent their lives, all of which said R. C. Milliken stated was necessary because the body of William A. Hunter was not found. That said R. C. Milliken, having been advised as aforesaid, himself wrote out the answers to the questions in said blank proofs of death and filled out all blanks therein, representing to the plaintiff that he had written all necessary matters therein, and plaintiff believing the same to be true and relying upon the said representations, signed and made oath to same before J. B. Gibson, of Pecos, District Clerk in and for Reeves County, said Milliken having selected said officer to administer said oath, and on the same day delivered same to him the said R. C. Milliken, he being duly authorized by the defendant to receive the same, and the same he promptly furnished the defendant at its Home Office; and the same is now in the possession of the defendant, and it is given notice to produce the same

upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff.

"Plaintiff shows that about the day after and the second and third days after receiving said 'proofs of death,' said R. C. Milliken called to see plaintiff with typewritten questions, also in reference to the death of William A. Hunter, and then and there prepared and wrote her answers thereto, and had her sign and make oath thereto before said officer, J. B. Gibson, and received the same, stating to the plaintiff that the printed form was not sufficient, and that said affidavits were necessary in the making of the proofs of death of William A. Hunter, of which affidavits and the contents thereof the said Milliken promptly advised defendant, and furnished the same to the Home Office of the defendant.

"Plaintiff avers that after the proofs of death and accompanying affidavits were prepared and executed, as aforesaid, the said R. C. Milliken then and there received and accepted same, at Pecos, Texas, for the defendant, as he was sent to Pecos with authority to do, without an intimation that they were not satisfactory, but to the contrary, he led plaintiff to believe that the same were satisfactory and that the said policies would be paid; all of which was done with the full knowledge, consent and ap-

proval of the defendant company.

"Plaintiff avers that in addition to her proof of death and claim made and delivered to R. C. Milliken, as aforesaid, and as a part thereof, at the special instance and request of the defendant made by and through its agent and representative, Abb Landis, defendant was furnished on or about the 25th day of January, 1897, a letter containing a full written statement in reference to the death of her brother, written by plaintiff to her father, W. A. Hunter, of Homer, Ohio, on December 30th, 1896, and obtained by the defendant on the day and year aforesaid, at its Home Office in Philadelphia.

"Plaintiff says that if her said proof of death and claim are not satisfactory, as pleaded in defendant's answer herein, which she denies, it is because of the fraud and deceit aforesaid of the said R. C. Milliken in the preparation of the same.

"Plaintiff avers that the defendant adopted and ratified the acts, representations, statements, promises and conduct of said Milliken, and is bound thereby.

"Plaintiff shows that on account of the fact that no one saw said deceased, William A. Hunter, when he was drowned, or his body thereafter, his body never being recovered, it was impossible for plaintiff to furnish to the defendant other facts for

proof of death than she did, which plaintiff avers, were reasonably sufficient and should be satisfactory to the defendant. That the defendant refused to pay said policies, denied liability, and asserted that said William A. Hunter was not drowned, thereby relieving plaintiff from the duty of making any other or further proof than that which was submitted to the defendant by plaintiff; that the defendant still insists that the said Hunter is alive and sets up the same as one of the defenses in its answer filed herein; that defendant's said agent, and through him, the defendant was fully advised of all the facts and evidence upon which plaintiff relied to establish the death of her said brother; that said Milliken obtained affidavits from her witnesses, as well as from herself; that all of the proofs of death, affidavits, etc., were, as aforesaid, gotten up and prepared by said agent; that if they are not sufficiently full or omitted anything necessary, it was on account of the failure and fraud of said agent; that defendant refused to pay said policies without direct evidence of the death of the said William A. Hunter, and the manner of his death made it impossible to produce that character of proof, it became impossible for her to furnish proof satisfactory to defendant, though as aforesaid, the proof so made was, and should be held, under the

circumstances of this case, sufficient to meet the terms of said policies requiring plaintiff to furnish reasonable proof of the death of her said brother; and in justice and right, defendant should now be estopped from attacking the sufficiency of said proof of death, and should not now be permitted to interpose the same as a defense herein.

"6. Plaintiff avers that the defendant is estopped from asserting that her proof of death and claim is not satisfactory, for the reason that after it was furnished to the defendant, as aforesaid, and the surrender of the policies properly receipted offered by plaintiff upon the payment thereof, defendant in nowise notified plaintiff that the same was not sufficient within ninety days thereafter, nor within any reasonable time, but ignored the proofs of death and declared her brother alive regardless thereof, and the policies became then and there, to-wit, ninety days after said proof was furnished to defendant, due and payable, and defendant is now estopped from denying the sufficiency of said proof, having received and accepted the same without notifying the plaintiff within the time required by said policies that the same were not satisfactory.

"7. Plaintiff further says that the defendant has waived proof of death and claim of any char-

acter whatsoever, by denying any liability on said policies; for that, on or about the day after receiving said proofs of death and affidavits, as aforesaid, the defendant did, by and through its said representative, R. C. Milliken, acting for the defendant in the usual scope of his duties and with authority, did state to the plaintiff, at Pecos, Texas, in substance that he had only been pretending to believe that William A. Hunter was dead; that he was not dead; that defendant would find him in a few days; and plaintiff states that while this conversation was going on the telegraph messenger called at her house and asked if said Milliken was there, and gave him a telegram, which, after reading, said Milliken handed to plaintiff, requesting her to read the same. The telegram was sent from defendant's state agency or office at Dallas, Texas, and was signed by one of defendant's representatives, whose name plaintiff cannot recall, and the substance of the telegram was that William A. Hunter had been found and arrested and would be brought at once to Pecos; that said R. C. Milliken urged that if plaintiff would cancel and surrender said policies before her brother was turned over to the sheriff at Pecos, that he, the said Milliken, would protect him and her from criminal prosecution.

"Plaintiff shows that said telegram was false

and fraudulent, and, together with the language of defendant's representative, Milliken, constituted not only a denial of any liability whatever, but an attempt on defendant's part to coerce, scare and frighten plaintiff into admitting defendant was not liable and relieving it from liability by cancelling and surrendering said policies;—all of which facts plaintiff is ready to verify, and pleads the same as a complete waiver of any proof of death and claim whatsoever; and plaintiff gives the defendant notice, as it has heretofore done, to produce said telegram upon the trial of this cause, or secondary evidence thereof will be made.

"8. Plaintiff shows that upon receipt of said notice of the death of William A. Hunter, defendant's said general agent and adjuster, R. C. Milliken, came to Texas and made a personal examination of and into all the facts and circumstances in reference to the death of said William A. Hunter, and though the same were amply sufficient to satisfy any reasonable person that William A. Hunter was, as plaintiff had notified defendant, dead, he had said telegram sent to himself, and showed the same to plaintiff, and by the false and deceitful means aforesaid, endeavored to frighten plaintiff into cancelling and surrendering to him said policies and releasing his company from its liability; and denied any lia-

bility whatever on the part of defendant, of which conduct the defendant was promptly advised by their said representative, and instead of repudiating the same, defendant has acted upon the same and ratified the same; whereby defendant waived said preliminary proofs of death, and should not now be heard to say that it is not liable upon its said policies because said proofs of death furnished by plaintiff, as aforesaid, are not satisfactory to it."

The plaintiff in error on the second day of February, 1900, filed its first amended original answer, in which it pleaded, in addition to the matters plead in its original answer, by special exception, that the 12 per cent. damages and reasonable attorney's fees sued for were in contravention of Sec. 1, Art. XIV of the Federal Constitution; and by special answer, that if Hunter was drowned, it was premeditated and suicidal; that William A. Hunter failed to pay the semi-annual premium due April 28th, 1897, vitiating the policies according to their terms; and plead by special answer, what it had already plead by exception, that the 12 per cent. damages and reasonable attorney's fees were unconstitutional. (Record pp. 14, 15, 16).

On the 28th day of May, 1900, the plaintiff in error amended its answer so as to render irrelevant its conduct pleaded in estopped and waiver of the

proofs of death being insufficient, if same were not sufficient, filing its second amended original answer, and plead by exception, in addition to the exceptions theretofore pleaded, as follows:

"(c.) Defendant specially excepts to all of paragraph No. 5 in said petition, because the same presents no issuable fact, because the averments therein are immaterial and irrelevant to any issue, and because they are calculated to prejudice the defendant on the trial of the case, and because there is no issue in the case, as to the sufficiency of the preliminary proofs or of any preliminary proofs.

"(d.) Defendant also specially excepts to paragraph No. 6, because there is no issue in the case involving the question of estoppel.

"(e.) Defendant also excepts to paragraph No. 7, because the allegations therein are immaterial and irrelevant to the issue, because same is calculated to prejudice the defendant on the trial hereof.

"(f.) The defendant also specially excepts to paragraph No. 8 of said petition, for the reason above indicated, and prays that each one of these special demurrers be sustained by the Court, and the said immaterial, irrelevant and prejudicial matter be stricken from the files and for naught held."

In this answer plaintiff in error repeated its general denial and special pleas or answers in refer-

ence to the alleged misstatement of Hunter as to his occupation; his alleged failure to pay the semi-annual premiums due April 28th, 1897; and that the 12 per cent. damages and reasonable attorney's fees were in violation of the Federal Constitution; but omitted the plea that the proofs of death did not show that William A. Hunter was dead, thereby eliminating and rendering the allegations above quoted from the petition setting forth the conduct of the insurance company's representative, Milliken, immaterial and irrelevant.

When the case came on for trial the plaintiff in error, before the Court and jury, waived the other special defenses pleaded in its answer, its waiver being embodied and made of record in the bill of exceptions, being as follows:

"Defendant admitted that all matters of proof re-
"lating to the death of the insured—all formal proofs—
"are sufficient, and that the only question to be tried
"and involved, is the question of whether or not Wil-
"liam A. Hunter is dead as claimed in plaintiff's peti-
"tion, and whether he died in the manner and form as
"alleged therein. Thereupon the Court sustained spe-
"cial exceptions, C, D, E and F of defendant to plain-
"tiff's amended petition." (Record pg. 36).

The trial resulted in a judgment in favor of defendant in error on July 4th, 1900, for

$21550.00; including 6 per cent interest, the statutory damages of 12 per cent. and reasonable attorney's fees.

The jurisdiction of the United States Circuit Court having been acquired solely on the ground of diversity of citizenship, the United States Circuit Court of Appeals, Fifth Circuit, had final jurisdiction of the cause, and this Honorable Court is without jurisdiction thereof.

In Wanton vs. DeWolf, 142 U. S. 138, a suit removed from the State Court to the Circuit Court of the United States on the ground of diversity of citizenship, the Court held: "It appears from the record that the suit involves land situated in California, and was commenced in the State Court against the defendants who were citizens of Rhode Island and New York, and after summons by publication, was removed on their application to the Circuit Court. The ground of Federal jurisdiction was diverse citizenship.

"By the act of March 3rd, 1891, (26 Stat. 826, c. 517,) establishing the Circuit Court of Appeals, the jurisdiction of this Court, in cases dependent upon diverse citizenship, was taken away; but by the joint resolution of March 3rd, 1891, (26 Stat. 1115,) the jurisdiction was preserved as to pending cases and cases wherein the writ of error or appeal

should be sued out or taken before July 1st, 1891."

In C. S. & L. Co., vs. G. R. S. D. Co., 146 U. S., 54, a motion was presented to dismiss for want of the jurisdiction of *the Court below* depending solely upon the diverse citizenship of the parties. The Court held, Chief Justice Fuller rendering the opinion: "Judgment was rendered in this case by the Circuit Court of the United States for the Southern District of Ohio on April 25th, 1891. An entry was made of record, June 19th, 1891, that the Court 'allow a writ of error to the Supreme Court of the United States, with stay of execution, upon the filing of a supersedeas bond,' as described, and such a bond was filed and approved June 20th, 1891. A petition for the allowance of the writ of error and an assignment of errors were filed in the Clerk's office of the Circuit Court, July 3rd, 1891, and the writ of error bears test and was filed in that office on that day, and a citation to the adverse party signed and served."

"The motion to dismiss must be sustained upon the authority of Wauton vs. DeWolf, 142 U. S."

That is to say, the Supreme Court held, that diversity of citizenship being the ground upon which the Circuit Court's jurisdiction was acquired and depended, by the Act of March 3rd, 1891, (26

Stat. 826, c. 517,) establishing the Circuit Courts of Appeals, its jurisdiction was taken away, and said Circuit Court of Appeals were given final jurisdiction of such cases.

In Borgmeyer Adm'r vs. Idler, 159 U. S., 408, Chief Justice Fuller rendering the opinion, the Court held: "When the original jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case."

In Colorado Central Consolidated Mining Co., vs. Turck, 150 U. S., 138, Chief Justice Fuller rendering the opinion, the Court held that the Supreme Court exercises appellate jurisdiction only in accordance with the Acts of Congress on that subject. That when the original jurisdiction of a Circuit Court of the United States is invoked upon the sole

ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked.

When the jurisdiction of a Circut Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. This was an action in ejectment in the Circuit Court of the United States for the District of Colorado. At the outset the Circuit Court was given jurisdiction on the ground of diversity of citizenship. In the Circuit Court the question was raised as to whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of section 2322 of the U. S. Revised Statutes, concerning the dip and apex of lodes, and that the suit really and substantially involved a controversy only to be determined by reference to the Federal

statute, and that jurisdiction existed on that ground and did not depend entirely upon diversity of citizenship.

The Court say: "To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence or the rulings of the Courts below."

"This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the Circuit Court, is limited to the facts appearing on the record in the first instance." (p. 142.)

In Ex-parte Jones, 164 U. S. 691, the Court held, Mr. Justice Brown rendering the opinion: "In this case the original bill averred the complaintant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the Act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship. Colorado Central Mining Co.. vs. Turck, 150 U. S., 138; Borgmeyer vs. Idler,

159 U. S., 408."

II.

The jurisdictional quéstion presented by plaintiff in error, namely, that said Art. 3071, Rev. Stats. of Texas, 1895, providing for 12 per cent. damages and reasonable attorney's fees in such cases as this, is in contravention of Sec. 1, Art. XIV, Constitution of the United States, is not an open, but settled question by the decisions of this Court, and plaintiff in error is attempting to perpetrate a fraud upon the jurisdiction of this Court, and the writ of error should be dismissed for want of jurisdiction.

The statute complained of, said Art. 3071, as originally passed on May 2, 1874, is the ninth section of an Act entitled, as follows:

"An Act to Regulate Life and Health Insurance Companies, and all Associations, Partnerships or individuals doing Life and Health Insurance business incorporated within or without the State of Texas." 2 Pasch. Dig. Art. 7116.

The said section nine, was carried forward into the Revised Statutes of Texas of 1879, where it appears in Articles 2953 and 2954, c. 3, of Title 53, relating to the general subject of insurance, in the precise language in which it now appears in the Revised Statutes of Texas of 1895, in Articles 3071 and 3072, c. 3, of Title 58, on the subject of insur-

ance, as follows:

"Art. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

"Art. 3072. Should any life or health insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after the officer holding such execution has demanded payment therefor from any officer, agent or attorney of such company in this State or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this State until said execution be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company."

The Revised Statutes of Texas, 1895, Art.

3096a, provides:

"A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities.

Article 3071 is not in contravention of the XIV Amendment of the Federal Constitution, and, in the light of the decisions, it is a fraud upon the jurisdiction of this Court to so contend. To give this Court jurisdiction the Federal question should be made in good faith and not frivolously and fraudulently. The plaintiff in error is a mere creation of local law, and can have no legal existence beyond the limits of Pennsylvania, the sovereignty which created it, and the recognition of it in other States and the enforcement of its contracts made therein depend purely upon the comity of those States.

In Paul vs. Virginia, 8 Wall, 168, the case of Bank of Augusta vs. Earle, 13 Peters, 519, was quoted with approval: "As said by this Court in Bank of Augusta vs. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even

by other States, and the enforcement of its contracts made therein, depend purely upon the comity of these States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with the citizens as in their judgment will best promote their public interest. The whole matter rests in their discretion."

We submit that a corporation cannot invoke that provision of Sec. 2, Art. IV, of the Constitution of the United States, which gives to the citizens of each State the privileges and immunities of the citizens of the several States. Pembina Mining Co., vs. Penn, 125 U. S. 181: Ducot vs. Chicago, 10 Wall, 410.

It has since been held in Blake vs. McClung, 172 U. S. 239; and in Orient Ins. Co., vs. Daggs, 172 U. S. 557; and in Waters Pierce Oil Co., vs. Texas,

177 U. S. 28—see p. 45, that the prohibitive words of the XIV Amendment of the Federal Constitution have no broader application in that respect.

In Hooper vs. California, 155 U. S. 648, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed and settled, "that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State." And the exception to the rule was stated to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

In Waters Pierce Oil Co. vs. Texas, *supra*, the Court held: "The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has

often been declared by this Court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating Act has made them, and can only be exerted in the manner which that Act authorizes. In other words, the State prescribes the the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations." This case cites with approval, Paul vs. Virginia, and Hooper vs. California, *supra*.

In Railway Co., vs. Matthews, 174 U. S. 96, the Court passed upon the constitutionality of the provisions of Sec. 2, Chapter 155 of the Acts of Kansas of 1885, entitled "An Act relating the liability of Railroads for Damages by Fire," providing that "in all actions commenced under this Act, if the plaintiff shall recover, there shall be allowed him by the Court a reasonable attorney's fee, which shall become a part of the judgment."

Matthews brought his suit in the State Court for the loss of property by fire, recovered judgment, including attorney's fees, and the judgment being affirmed by the Supreme Court of Kansas, the Railway Company brought the case to this Court

on error. This Court held:

"It is contended that it is in conflict with the Fourteenth Amendment to the Federal Constitution, and this contention was distinctly ruled upon by the Supreme Court of the State adversely to the Railroad Company. In support of this contention great reliance is placed upon Gulf, Colorado & Santa Fe Ry. Co., vs. Ellis, 165 U. S. 150. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations . . . . . While there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The limit in amount, ($50), found in that statute, made it clear that no police regulation was intended, for if it were, the more stock found on the track the greater would be the danger and the more imperative the need of regulations and penalty."

"We have referred to the interpretation placed

upon the respective statutes of Texas and Kansas by their highest Courts, not as conclusive, but as an interpretation toward which we ought to lean, and which, in fact, commends itself to our judgment."

"It is also clear that the legislature, (which has power in advance to determine what rights, privileges and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. St. Louis, &c., Railway Company vs. Paul, 173 U. S. 404. It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not likely hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

In the Court below plaintiff in error relied upon the Ellis case, which, as held in the Matthews case, is not applicable to statutes like the Kansas law; and certainly not to the Texas statute under consideration, which is the exercise of the right to enact and to enforce regulations and conditions on

which foreign insurance companies are permitted to do business in the State.

In Insurance Company vs. Herriott, Treasurer State of Iowa, et al., 91 Federal Reporter, 711 it was contended that the insurance laws of Iowa (Code, Sec. 1333), requiring foreign insurance companies doing business therein to pay to the State each year a percentage of the gross premiums received from such business during the previous year was in contravention of the Fourteenth Amendment of the Federal Constitution.

The Court held, Judge Shiras rendering the opinion: "In the bill filed it is averred that the complainant companies, more than 15 years ago, were admitted into the State of Iowa for the purpose of transacting the business of insurance, and that they then fully complied with all the provisions and requirements of the laws of Iowa necessary to secure their lawful admission into and recognition by the State, and that they have since complied each year with the requirements of the State laws and have each year had issued to them the certificate showing their authorization to continue in business in Iowa. It is further averred that in reliance upon this action on part of the State the complainants have expended large sums of money in establishing agencies, in securing offices,

in advertising, and in providing the materials necessary to conduct their business in Iowa, and that they have entered into many contracts of insurance with the citizens of Iowa, which are now in force, and have expended large amounts in meeting the obligations arising in Iowa in connection with the business which they were authorized by the State to undertake in Iowa."

"It cannot be denied that the State has the right to prescribe the terms, conditions and burdens subject to which a foreign corporation can obtain the right of admission into the State, and it is beyond question that, so long as the provisions of Section 1333 remain in force, no foreign corporation can secure the privilege of admission into the State, except upon a compliance with its requirements. But it is said that, after a foreign corporation has once rightfully entered the State, and engaged in business therein, no additional burden or restrictions can be imposed as a condition to the exercise of the right to continue in business. The power and right of the State to exclude foreign corporations, not engaged in interstate commerce, or in the furtherance of the business of the United States, from entering the State, includes the right to preclude such foreign corporations from continuing in business, and also includes the right to impose conditions upon such

continuances. When a foreign corporation has been admitted into a State, and has, in connection with the business it was authorized to carry on, accumulated property, or entered into contracts, such property and contract rights are under the protection of the law, but the right to invoke protection for such acquired property does not confer upon the corporation the right to insist that it shall be permitted to enter into further contracts, or acquire other property, contrary to the expressed will of the State embodied in an Act of the Legislature."

"The privilege of continuing in the business of insurance within the State, in the case of the complainant companies, is derived from the legislation of the State, and it is for the Legislature to determine, from time to time, upon what terms, and subject to what conditions, such privilege will be continued to the companies. The general subject of the power of the State to wholly exclude foreign corporations from carrying on business therein, or to impose terms, conditions, and restrictions upon the privilege was fully considered by the Supreme Court in Paul vs. Virginia, 8 Wall., 168; and in Ducot vs. Chicago, 10 Wall., 410."

In Merchants Life Association of the United States vs. Yoakum, 98 Fed. Reporter, 251, the Court of Appeals, Fifth Circuit, in error to the Circuit

Court of the United States for this, the Northern District of Texas, the same attack was made upon this very law,—Rev. Stats. of Texas, 1895, Art. 3071, quoted above, as is now being made upon it. That is to say, the same old contention which has been exploded by this Court, time and time again, since the decision of Paul vs. Virginia, *supra*.

The opinion of this Court, rendered by Judge McCormick, is an exhaustive, able and philosophical discussion of the question in the light of the numerous decisions upon the question, and should satisfy any one open to conviction that the law is valid, and is a lawful condition imposed by Texas upon foreign insurance companies doing business in Texas.

In the above case the Court say: "The fourth assignment is that 'the Court erred in rendering judgment for 12 per cent. damages upon $5,000.00, and also for $750 for attorney's fees, for the reason that such charges constitute a penalty upon the defendant for defending this litigation, and discriminate against it, and are consequently contrary to law and unconstitutional.' . . . . . It must be manifest to the most casual observation that the parties to these insurance contracts and to such a controversy are unequally matched. It is human nature and human experience that the stronger will

use his strength. He may piously declare his benevolent intentions, and disclaim any purpose to profit by his power, but he will use it none the less. Without the aid of a legal fiction, we cannot say or think that the minds of these contracting parties do or can ever meet. One is a mere legislative thought, a legal, artificial, imaginary entity, invisible, endowed with immortality, and almost superhuman powers of organization and delegated activities, and infinite capacity for expansion and the receiving of tribute. It can act only through agents. For the exercise of its controlling powers, it is able to secure, and constantly retain, the highest order of talent in every department of its organization. In a world-wide field of minute operations these governing agents, wherever located, must, of necessity, be practically unapproachable by the vast concourse of parties with whom the invisible principal deals. A hierarchy results. Of this hierarchy the lowest rank, in prodigious swarm, fill the land. The scope of their agency is limited with marvelous skill. Armed with longer and shorter catechisms, and a form of covenant devised with consumate ingenuity. . . . . The subject is a large one. It is one peculiarly vital to public interest. It challenges legislative attention. The foregoing examples, which we have

taken from the record in this case and from the Texas Reports, are by no means exceptional in that State, but are representative. It seems to us that the State legislation drawn in question by this assignment is not in conflict with the Fourteenth Amendment to, or any other provisisn of, the Constitution. It is not simply a statute imposing a penalty on life or health insurance companies for failing to pay certain debts, but is one to enforce reasonable regulations and conditions on which such companies are permitted to do business in Texas. The purpose of this statute is not to compel the payment of debts. Life and health insurance companies do not usually neglect or defer the payment of their admitted debts. They generally advertise themselves as having a large accumulation of surplus revenue, and as being ready to pay, as soon as it matures, whatever debt they owe. The obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance, so that the immortal insurer will not receive premiums from an honest recipient of one of its policies which does not bind it to meet the loss that he bargains it shall meet, and in consideration for which he parts with his money while he is alive and able to make earnings, that he may, to the extent stipulated, protect his family or his creditors

against the contingency of his death, which must occur. To enforce the exercise of this righteous care on the part of the very strong in contracting with the weaker and less learned, and in conducting humanely this particular business that reaches so often across the graves of the insured to the homes of the afflicted dependents, so that the insurers will not receive premiums from honest parties whom the contracts as written do not insure, would seem to be within the legislative power. The classification here involved is, therefore, not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies. It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to observe the general interest of the public. . . . . As Articles 3071 and 3072, c. 3, Tit. 58, Rev. Stat. Texas, were in force at the time the Yoacum policy was written, those provisions were assented to by the contracting parties, and were written into the contract."

The Supreme Court of Texas also holds that Article 3071 is not violative of the Constitution of Texas nor of the Constitution of the United States. Insurance Company vs. Chowning, 86 Texas, 654;

Causalty Company vs. Allibone, 90 Texas, 660.

In the light of these decisions, we submit that the right of the State of Texas to enact the law complained of by plaintiff in error, and to enforce the condition embraced therein upon all life and health insurance companies doing business in Texas, as they are defined in said Article 3096a, including plaintiff in error, cannot be seriously questioned. When the insurance company obtained and accepted the application of William A. Hunter for the insurance, and when it executed and delivered the policies and received from him the premiums, it knew that the provision of the law became a part of the contract of insurance, imposed by the State as a condition upon its being allowed to do business in Texas, and its contention that the law is inhibited by the Federal Constitution is not made in good faith and is a fraud upon the jurisdiction of this Court, which should require a dismissal of the writ of error.

III.

Premises considered, defendant in error prays that the writ of error herein be dismissed for want of the jurisdiction of the Court and for such other

and further relief as to the Court may seem fit and proper.

Wm H. Clark,
C. A. Culbertson

Counsel for the Defendant in Error, Jennie M. Mettler.

Motion to dismiss or affirm.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 2, 1901.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS, AT DALLAS.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM THE JUDGMENT.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.

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Motion to Dismiss Writ of Error or Affirm the Judgment.

Now comes Jennie M. Mettler, defendant in error in the above-entitled cause, a *feme sole*, and moves the court to dismiss the writ of error herein, because this court is without jurisdiction of the cause, and in the event said motion is denied that the judgment be affirmed.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.